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Supreme Court of the United States

COMMONWEALTH OF MASSACHUSETTS, *et al.*,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR *AMICUS CURIAE* WASHINGTON LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

Amicus curiae Washington Legal Foundation will address the first question presented as set forth in the Brief for Petitioner Commonwealth of Massachusetts, *et al.*, specifically:

1. Whether the Administrator of the Environmental Protection Agency has authority to regulate air pollutants associated with climate change under section 202(a)(1) of the Clean Air Act, 42 U.S.C. 7521(a)(1).

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INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation ("WLF") is a national, non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide. WLF's supporters include consumers, businesses, and property owners who are adversely affected by excessive regulation of their activities under various environmental statutes such as the Clean Air Act ("CAA") and Clean Water Act.[1]

Over the years, WLF has filed *amicus* briefs in this Court and lower federal courts opposing the federal government's assertion of regulatory and enforcement authority over certain environmental and health matters. *See, e.g., Rapanos v. United States*, 126 S. Ct. 2208 (2006); *Whitman v. Am. Trucking Assn's, Inc.*, 531 U.S. 457 (2001); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000); *Envtl. Def. v. Duke Energy Corp., cert. granted*, 126 S. Ct. 2019 (2006).

More particularly, WLF appeared as *amicus* in the court of appeals below in the instant case as an outgrowth of WLF's opposition to a 1999 citizen petition filed with the EPA by a group of organizations led by the International Center for Technology Assessment ("ICTA") seeking regulation of greenhouse gas ("GHG") emissions from new motor vehicles under CAA § 202(a), 42 U.S.C. § 7521. WLF successfully argued in its 47-page filing that EPA should deny ICTA's petition for rulemaking both because the CAA

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[1] All parties have consented to the filing of this brief. Their consents are on file with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief.

was not intended to apply to emissions of GHGs and because there was a lack of evidence showing a risk to human health and welfare from anthropogenic GHG emissions. Moreover, any such regulation would impose excessive and unnecessary costs on our society and economy.

In addition, WLF's Legal Studies Division has produced numerous studies, reports, and monographs concerning EPA's excessive and questionable regulations and enforcement practices and policies. *See, e.g.*, Yamada, *EPA Lacks Authority To Regulate Carbon Dioxide Emissions* (WLF Legal Opinion Letter, Oct. 30, 1998); Glaser, *EPA's Latest Maneuvers On "Global Warming" Legally Suspect* (WLF Legal Backgrounder, Nov. 3, 2000).

While WLF agrees with all the arguments presented by the EPA in this case as to why the judgment of the court of appeals should be affirmed, including Petitioners' lack of standing, WLF will focus its brief on the administrative law and related public policy issues as it did in the court of appeals.

SUMMARY OF ARGUMENT

In *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), in determining whether Congress intended to regulate tobacco products under the Food, Drug and Cosmetic Act, the Court observed that "we must be guided by a degree of common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency." *Id.* at 133. The Court's reliance on common sense interpretation applies with particular force to potential regulation of carbon dioxide ("CO_2") and other GHGs. Tobacco regulation pales as a matter of social and economic importance in comparison with regulation of GHGs because carbon-based fuels are at the heart of our economy and the

way we live our lives. Indeed, potential global climate change and GHG regulation have become the seminal energy and environmental issue of recent years. It is extremely unlikely that Congress authorized regulation in an area of such importance without explicitly saying so and without creating a legislative record reflecting so momentous a step.

ARGUMENT

I. POTENTIAL GLOBAL CLIMATE CHANGE HAS BEEN THE MOST PROMINENT ENERGY AND ENVIRONMENTAL ISSUE OF RECENT YEARS.

A. The Public Debate.

The claim that human activity is changing the global climate has unquestionably been the most prominent issue at the intersection of American energy and environmental policy in recent years. No other issue engenders such extreme predictions of global environmental damage as are made by those who advocate the necessity of GHG controls. At the same time, because significant cuts in GHG emissions would require substantial reductions in the use of fossil fuels such as oil, coal and natural gas even as the economy continues to grow, no other issue creates economic and social challenges of such magnitude. For instance, EPA has observed both that (1) climate change is "perhaps the biggest environmental threat to the planet"[2] and (2) "[i]t is hard to imagine any issue in the environmental area having greater

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[2] *Hearings Before the Subcomm. on Clean Air and Nuclear Regulation of the Senate Comm. on Environment and Public Works*, 103d Cong., 2d Sess. (April 14, 1994) (testimony of Robert Sussman, EPA Deputy Administrator).

'economic and political significance' than regulation of activities that might lead to global climate change."[3]

The briefing in this case illustrates the dramatic nature of claimed global climate change damages. For instance, relying on out-of-context statements from various scientific reports, various *amici* here warn of unprecedented temperature increases, polar ice cap melting, rising sea levels inundating coastal communities, killer storms combined with devastating drought, huge losses of species, epidemic diseases, and the like. *See Amici Curiae* briefs of Climate Scientists, North Coast Rivers Alliance, *et al.*, and Wildlife Conservation Interests. These assertions mirror similar statements often made by various members of the Petitioners group.[4]

The claim that there is a scientific "consensus" on the likely dire consequences of continued GHG emissions is vigorously contested by many in the scientific community. The Court is referred to the November 29, 1999 comments filed with EPA in this proceeding by the Working Group to Oppose Expanded EPA Authority containing a detailed summary of the state of the science. Additionally, EPA, in its denial of the underlying Petition for Rulemaking, concluded that the scientific consensus claimed by Petitioners does not exist and that considerable uncertainty remains on key scientific questions. The lead opinion below rejected Petitioners' contention that EPA's conclusions in this regard are arbitrary. *Massachusetts v. EPA*, 415 F.3d 50, 57-58

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[3] *Control of Emissions from New Highway Vehicles and Engines*, 68 Fed. Reg. 52,922, 52,928 (Sept. 8, 2003).

[4] For instance, Petitioner NRDC's website warns of "dangerous consequences: drought, disease, floods, lost ecosystems . . . sweltering heat to rising seas . . . [t]he polar ice cap is shrinking fast." Nrdc.com, Global Warming, http://www.nrdc.org/global warming/default.asp.

(D.C. Cir. 2005). Citing the National Research Council ("NRC") report *Climate Change Science: An Analysis of Some of the Key Questions* (2001), EPA said:

> As the NRC noted in its report, concentrations of GHGs are increasing in the atmosphere as a result of human activities (pp. 9-12). It also noted that "[a] diverse array of evidence points to a warming of global surface air temperatures" (p. 16). The report goes on to state, however, that "[b]ecause of the large and still uncertain level of natural variability inherent in the climate record and the uncertainties in the time histories of the various forcing agents (and particularly aerosols), a causal linkage between the buildup of greenhouse gases in the atmosphere and the observed climate changes during the 20th century cannot be unequivocally established."

68 Fed. Reg. at 52,930.

Noting "[t]he science of climate change is extraordinarily complex and still evolving," EPA listed the numerous areas of continuing uncertainty identified by the NRC. According to EPA, "these uncertainties limit our ability to assess each of these factors and to separate out those changes resulting from natural variability from those that are directly the result of increases in anthropogenic GHGs." *Id.*

The economic side of the issue prompts equal controversy, because significantly reducing GHG emissions would be an extraordinary societal undertaking. CO_2, the principal human-produced GHG, is the unavoidable by-product of combusting fossil fuels, and fossil fuels are, by

far, the largest source (70 percent) of energy in America. *Id.* at 52,928. As the Intergovernmental Panel on Climate Change ("IPCC"), a source on which Petitioners rely in their brief, has noted, "[e]missions of GHGs are associated with an extraordinary array of human activities." IPCC, *Climate Change 2001: Mitigation* ("IPCC 2001"), at 608, *available at* http://www.ipcc.ch/. The United States Energy Information Administration ("EIA") reached the same conclusion: "there are a vast number of entities that emit carbon – homes, factories, vehicles, commercial facilities, and other agricultural resources unlike [for instance] the relatively few electricity generators covered by the SO_2 reduction program in the first phase." *Hearings Before the Senate Comm. on Energy and Natural Resources*, 106th Cong., 1st Sess. (March 25, 1999) (testimony of Jay Hakes, EIA Administrator). According to EPA, "[v]irtually every sector of the U.S. economy is either directly or indirectly a source of GHG emissions." 68 Fed. Reg. at 52,928. Because significantly controlling carbon emissions would entail fundamental changes to our economy and the way we live, a variety of authorities have concluded that the cost of such controls would be massive.[5]

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[5] With respect to the cost of complying with the Kyoto Protocol, *see* Wharton Economic Forecasting Associates, Inc., *Global Warming: The High Cost of the Kyoto Protocol, National and State Impacts*, 1998 (loss of 2.4 million jobs; annual loss of $300 billion in U.S. GDP). A study by Stephen Brown, senior economist at the Federal Reserve Board, determined that in order to meet the emissions cuts of Kyoto, U.S. domestic consumption would be reduced by 25 percent, the equivalent of stopping all highway, rail, air and sea traffic permanently. Both documents are cited and discussed in WLF's comments in the record of the EPA proceedings below. *See* November 29, 1999 comments filed by Working Group to Oppose Expanded EPA Authority in the record of this case.

Global climate change also differs fundamentally from other energy and environmental issues the U.S. faces. According to the IPCC, "[t]he global nature of the problem . . . implies that the full breadth of human social structures is encompassed." IPCC 2001, at 607. The IPCC notes:

> A combination of several features lends the climate problem its uniqueness. They include public good issues arising from the concentration of GHGs in the atmosphere that requires collective global action, the multiplicity of decision makers ranging from global down to the micro level of firms and individuals, and the heterogeneity of emissions and their consequences around the world. Moreover, the long-term nature of climate change originates from the fact that it is the concentration of GHGs that matters rather than their annual emission and this feature raises the thorny issues of intergenerational transfers of wealth and environmental goods and bads. Next, human activities associated with climate change are widespread, which makes narrowly defined technological solutions impossible, and the interactions of climate policy with broad socioeconomic policies are strong. Finally large uncertainties or in some areas even ignorance characterize many aspects of the problem and require a risk management approach to be adopted in all [decision-making frameworks] that deal with climate change.

Id. at 66.

For these reasons, potential global climate change has been a prominent feature of public discourse and policy debate for many years. The matter assumed central importance with widely reported Congressional testimony by NASA scientist James Hansen in 1988 as to a potentially runaway greenhouse effect, *Hearings Before the Senate Comm. on Energy and Natural Resources*, 100th Cong, 2d Sess. 39 (1988), and the formation that year of the IPCC. To date, global climate change has probably been the subject of more than two hundred hearings and briefings before various congressional committees. Regulatory and non-regulatory legislation on the subject has been introduced in Congress yearly since the late 1980s. It is a topic debated in the last three presidential elections, and was raised in the debates between President Bush and Senator Kerry. Commission on Public Debates, October 8, 2004 Debate Transcript. Global climate change is now a widely discussed topic in books,[6] magazines,[7] the internet[8] and even the movies.[9]

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[6] The term "global warming" yields 19,283 hits in a search of books on Amazon.com (Oct. 13, 2006).

[7] Based on a search of the Nexis Mega news file, 880 articles were published with the term "global warming" in their titles in the last thirty days (Oct. 16, 2006).

[8] The term "global warming" yields about 50,200,000 hits on Google (Oct. 13, 2006).

[9] *See An Inconvenient Truth* (Paramount Classics and Participant Productions 2006), a highly publicized documentary still in theaters. The film *The Day After Tomorrow* (20th Century Fox 2004) dramatizing sudden climate change was the fifth highest box office film of 2004. boxofficereport.com, Http://www.box officereport.com (last visited Oct. 18, 2006).

B. Where the Issue Stands Today.

Given the prominence of the global warming issue to date, there ought to be no dispute as to where the debate stands today in terms of Congressional action. The record of Congressional action on global climate change is detailed in Respondents' brief. As shown by Respondents, Congress has consistently rejected proposals to require or even authorize mandatory controls on GHG emissions, most recently in the current Congress. *See, e.g.*, 151 CONG. REC. S7029 (daily ed. June 23, 2005) (Senate rejection of S.A. 826, the so-called McCain-Lieberman bill). Instead, Congress has enacted several statutes mandating scientific research and calling for negotiations to develop an international framework for addressing climate change globally.[10]

These international negotiations have not resulted in the United States agreeing to GHG emission reductions. International negotiations first were mandated by Congress almost two decades ago in the Global Climate Protection Act of 1987. In 1992, President George H. W. Bush signed, and the Senate approved, the United Nations Framework Convention on Climate Change ("UNFCCC"), which brought together a coalition of countries for a coordinated approach to climate change. United Nations Framework Convention on Climate Change, May 9, 1992, S. TREATY DOC No. 102-38 (1992), 1771 U.N.T.S. 107.

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[10] *See* National Climate Program Act of 1978, 15 U.S.C. §§ 2901-2908, *et seq.*; section 711 of Energy Security Act of 1980, Pub. L. No. 96-294; Global Climate Protection Act of 1987, 15 U.S.C. § 2901 note; Global Change Research Act of 1990, 15 U.S.C. §§ 2931-2938; Title XXIV of the Food and Agriculture Act of 1990, Pub. L. No. 101-624, § 2401; Title XVI of the Energy Policy Act of 1992, Pub. L. No. 102-486.

The UNFCCC did not mandate emission reductions by the United States or any other countries. Instead, the "shared understanding" of the Executive Branch and the Senate when the Senate gave its advice and consent to ratification was that the UNFCCC did not impose "legally binding targets and timetables for reducing emissions of greenhouse gases." S. EXEC. REP. NO. 102-55, at 14 (1992).

Nevertheless, the United States has been actively involved in international activities under the UNFCCC to address global climate change. Negotiations led to the Kyoto Protocol in December 1997, which called for mandatory GHG emissions reductions by developed nations. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 37 I.L.M. 22. In a resolution addressing the Protocol, the Senate formally expressed misgivings over the prospect that the economic burdens of GHG reductions would be shouldered exclusively by developed nations, S. Res. 98, 105th Cong. (1997) (resolving by vote of 95-0 to urge the President not to sign any agreement that would result in serious harm to the economy or that did not include commitments regarding GHG emissions by developing nations). Although President Clinton signed the Protocol, he did not present it to the Senate for advice and consent to ratification. Thereafter, Congress enacted annual legislation affirmatively barring EPA from implementing the Protocol. *See* Pub. L. No. 105-276, 112 Stat. 2461, 2496 (1998); Pub. L. No. 106-74, 113 Stat. 1047, 1080 (1999); Pub. L. No. 106-377, 114 Stat. 1141, 1441A-41 (2000).

At present, the global climate change issue remains highly controversial and a matter of intense public debate. Nevertheless, the fact that the United States has not ratified the Kyoto Protocol or enacted legislation mandating GHG emission controls means that, to date, our country has affirmatively elected not to require such controls.

II. CONTRARY TO PETITIONERS' CLAIMS, THIS CASE IS ABOUT CONSIDERABLY MORE THAN JUST VEHICLE TAILPIPE EMISSIONS.

Petitioners seek to minimize the importance of this case by characterizing it as concerning only GHG emissions from new motor vehicles. Pet'rs Brief at 28. In reality, the determination they seek, that EPA must regulate GHG emissions under that section, could trigger a massive GHG regulatory program because it could require that EPA adopt regulations affecting virtually any source that emits GHGs in non-trivial amounts. This is because, as Petitioners recognize, the triggering language they rely on in CAA § 202(a) ("emission of any air pollutant ... which in his [the EPA Administrator's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare") is identical to triggering language for a host of other CAA regulatory programs. Pet'rs Brief at 35 ("...the trigger for much of the regulatory action that occurs under the Act is the endangerment of public health or welfare"). Indeed, a lawsuit seeking to compel EPA to set GHG New Source Performance Standards for new or modified stationary sources already has been filed and was stayed pending the outcome of the Court's decision here. *See New York v. EPA*, No. 06-1131 (D.C. Cir.), *per curiam* order of Court of Appeals (Sept. 13, 2006).

The most far-reaching regulatory program that could result if the Court were to accept Petitioners' reading of the CAA is promulgation of a National Ambient Air Quality Standard ("NAAQS") for CO_2. Petitioners claim that a CO_2 NAAQS would not necessarily be required under their reading of the CAA because the endangerment finding is only one of three findings required to trigger promulgation of a NAAQS under CAA § 108(a), 42 U.S.C. § 7408(a). Pet'rs

Brief at 28-29. But Petitioners do not contest that the second finding (presence of the pollutant in the ambient air resulting from "numerous or diverse mobile or stationary sources") would be purely ministerial for CO_2. And while they seem to suggest that the third finding (the Administrator "plans to issue air quality criteria under this section") might leave discretion in the Administrator to decline to issue NAAQS for CO_2, they do not actually take that position. Pet'rs Brief at 29. Assuming the Administrator made the first two findings, it is hard to understand how he could then decide not to issue air quality criteria initiating the NAAQS-setting process.

A NAAQS program for CO_2 would be completely unworkable. Despite Petitioners' attempt in a footnote to argue that CO_2 NAAQS attainment issues would be no different than attainment issues for other NAAQS that are affected by international emissions, *id* at 29 n. 19, CO_2 attainment issues in fact would be far different than those for any other pollutant. Unlike other pollutants subject to NAAQS, CO_2 circulates and is well-mixed in the global atmosphere. Hence, a ton of CO_2 emitted in, for instance, Bangladesh, has the same effect on concentrations over Boston as a ton emitted in Boston. Since the United States emits only about 25 percent of total global anthropogenic CO_2 emissions, and since this percentage is projected to decline in the future as the Third World continues to develop, there is nothing any state or group of states can do to affect CO_2 concentrations within their borders. As a result, as EPA found, the entire NAAQS program – including the establishment of NAAQS, the designation of attainment and nonattainment areas, the submission of State Implementation Plans, and the regulatory apparatus for maintaining attainment areas and bringing nonattainment areas into compliance – would be a gigantic exercise in futility for CO_2. 68 Fed. Reg. at 52,926-27. *Cf. Huffman v. Western Nuclear, Inc.*, 486 U.S. 663, 673 (1988) (Congress should

not be presumed to provide regulatory authority to an agency "to impose restrictions that [are] somehow calculated to serve [an] unattainable goal").

Despite its futility, a CO_2 NAAQS program would significantly affect almost every aspect of the American economy. As this Court stated, "[t]he NAAQS . . . are the engine that drives nearly all of Title I of the CAA . . . ." *Whitman*, 531 U.S. at 468. Suppose on the one hand that the CO_2 NAAQS is set at a level below current ambient concentrations, with the result that the entire United States would be a non-attainment area. Every state would then be required to submit a nonattainment plan demonstrating the control measures it intends to adopt to bring the state into attainment by a date certain. CAA § 172, 42 U.S.C. § 7502, and particularly CAA § 172(c)(6), 42 U.S.C. § 7502(c)(6). Despite the fact that the states would be powerless to attain the NAAQS, they would face the loss of federal highway funding by failing to do so. CAA § 179, 42 U.S.C. § 7509. Nonattainment across the United States would also preclude the construction or modification anywhere in the country of major stationary sources, such as manufacturing plants, electric generating plants, and other industrial facilities. Under CAA § 173(a)(1), 42 U.S.C. § 7503(a)(1), major stationary sources cannot be built unless they obtain sufficient offsets to ensure that that the nonattainment area makes reasonable further progress towards attainment. This of course would be a practical impossibility for a CO_2 NAAQS because, with every nonattainment area in the country required to make actual emission reductions, no offsets would be available.

Suppose on the other hand that the CO_2 NAAQS is set at a level below current ambient concentrations and therefore no state is in nonattainment. Nevertheless, every state would be required to submit state implementation plans setting forth measures ensuring continued achievement of the

standard. CAA § 110(a), 42 U.S.C. § 7410(a). Presumably, this would mean that the states would be required to offset the global growth in emissions, again a practical impossibility.

In sum, Petitioners are more than a little disingenuous in contending that the relief they seek is limited to motor vehicles and therefore would not trigger massive consequences throughout the economy. In reality, if EPA has authority and an obligation to regulate GHGs under Title II, it has the same authority and obligation to do so under Title I. Regulation under Title I would necessarily result in a huge regulatory program, as EPA and the states struggled with the impossible task of attaining or maintaining the NAAQS. *Train v. NRDC*, 421 U.S. 60, 86 (1974) ("Congress intended to impose national ambient air standards to be attained within a specific period of time."); *Union Elec. v. EPA*, 427 U.S. 246, 249-50 (1975) (CAA is designed to "guarantee prompt attainment and maintenance of specific air quality standards.").

III. CONGRESS CANNOT BE UNDERSTOOD TO HAVE AUTHORIZED EPA TO REGULATE ON A SUBJECT OF SUCH OVERRIDING SOCIETAL IMPORTANCE AS GLOBAL CLIMATE CHANGE WITHOUT HAVING CLEARLY AND SPECIFICALLY EXPRESSED ITS INTENTION TO DO SO.

Given the history of the global climate change debate in the United States, Petitioners' contention that there has been latent authority in the CAA since 1970 to adopt a massive GHG control program is not credible. It seems to be Petitioners' view that, despite wide public discourse of the issue for many years, the regulatory authority GHG advocates have loudly but unsuccessfully called for, in fact existed all along lying dormant and unnoticed until recently

discovered. Indeed, it seems to be Petitioners' view that this long-sought regulatory authority was hiding in plain sight in the CAA, a statute minutely dissected through the years by legislators and lawyers, both in the comprehensive CAA amendments of 1977 and 1990 and in seemingly endless litigation in this and other courts. However, it is implausible in the extreme that the GHG regulatory authority that Petitioners now maintain is "straightforward" on the face of the CAA, Pet'rs Brief at 2, was overlooked by so many for so long. In fact, when asked by Congress for a complete list of policy options for addressing global climate change, EPA in 1990 produced a comprehensive report that nowhere mentioned pre-existing CAA authority to regulate GHG emissions for climate change purposes. EPA, *Policy Options for Stabilizing Global Climate Change, Final Report to Congress*, Office of Policy, Planning, and Evaluation, PM221 (1990).

Equally implausible is the legislative mechanism Petitioners claim as the source of this far-reaching but, until recently, overlooked authority. Petitioners claim that Congress in 1970 authorized EPA to restrict GHG emissions simply by redesigning the CAA § 302(h), 42 U.S.C. § 7602(h), list of "welfare" effects to include effects on "climate." Pet'rs Brief at 15. *See also* CAA § 302(h), *reprinted in A Legislative History of the Clean Air Act Amendments of 1970*, 93d Cong., 2d Sess. (Comm. Print 1974). Congress, however, when it added this language, did not evince any understanding that, by doing so, it was authorizing the massive regulatory program Petitioners now seek to mandate.[11] There was no debate in Congress in 1970

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[11] Moreover, there is no textual basis to assume that Congress in 1970 necessarily understood the term "climate" to refer to a global climatological phenomenon such as global climate change, as opposed to local climate conditions affected by local pollutant emissions. *See* Webster's Seventh New Collegiate Dictionary (1969) ("Climate" is "the average course or condition of the

surrounding the new wording; no GHG or climate program enacted into the CAA at the time or thereafter to accompany the new wording; and no explanation by Congress of its intent in amending the CAA § 302(h) language. Surely, to quote Justice Stevens in another context, "[i]f Congress had intended such a significant change . . ., some indication of this purpose would almost certainly have found its way into the legislative history." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 255 (1992) (Stevens, J., concurring).

Indeed, nowhere in the mammoth text of the CAA, including CAA § 202(a), is there any explicit grant of authority to regulate GHGs or CO_2. The term "carbon dioxide" is mentioned exactly *one* time in the entire codified version of the Act, in a non-regulatory provision mandating research and study. CAA § 103(g)(l), 42 U.S.C. § 7403(g)(1). *See also*, the reference to CO_2 in CAA § 821 requiring "monitoring" rather than regulation.[12] The term "global warming" is likewise mentioned but once in the Act, in CAA § 602(e), 42 U.S.C. § 7671a, directing the Administrator to examine the global warming potential of certain listed substances that contribute to stratospheric ozone depletion. Such direction, however, is accompanied by the admonition that it "shall not be construed to be the basis of any additional regulation under the [CAA]." By contrast, at this point in time, more than thirty years into implementation of the modem CAA as enacted in 1970, *every* air pollutant that EPA regulates for mobile sources under CAA § 202(a) is subject to a specific program tailored for the control of such pollutant under CAA §§ 202(g)-(i), 42 U.S.C. § 7521. The statute also lists literally hundreds of other pollutants designated for control. *See* CAA Title 1, Part

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weather *at a place* over a period of years as exhibited by temperature, wind velocity, and precipitation." (emphasis added)).

[12] Section 821 is uncodified and appears as a note to CAA § 412, 42 U.S.C. § 7651k.

D, 42 U.S.C. §§ 7501-7509a, for specific regulatory requirements for six listed criteria pollutants; CAA § 112, 42 U.S.C. § 7412, establishing a detailed regulatory scheme for 190 listed hazardous air pollutants; and CAA Title VI, 42 U.S.C. §§ 7671-7671q, providing a regulatory scheme for 53 ozone-depleting substances.

As Justice Frankfurter observed, in interpreting a statute, "[o]ne must . . . listen attentively to what it does not say." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 536 (1947), *quoted in Connecticut Nat'l Bank*, 503 U.S. at 255 (Stevens, J., concurring). What one hears when one listens to the CAA for an expression of Congressional intent to regulate on a matter of such significance as global climate change is nothing more than the silence of the "watchdog [that] did not bark in the night." *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting, *quoted in Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991).

Under basic principles of administrative law, the 1970 legislative language on which Petitioners rely is too thin a reed to support a GHG regulatory program. Legislative delegations of authority to administrative agencies into new subject areas must be made clearly, and the more important the issue, the clearer the delegation should be. *MCI Telecomm. Corp. v. AT&T Co.*, 512 U.S. 218, 231-232 (1994); *see also* Ernest Gellhorn and Paul Verkuil, *Controlling Chevron-Based Delegations*, 20 CARDOZO L. REV. 989, 1008 (1999) ("The more significant the question and the greater the impact the expansion of the agency's jurisdiction is likely to have, the greater the likelihood that Congress did not intend implicitly to delegate that determination to an agency."). As the Supreme Court said of a legislative delegation in an area of considerably less national and international import than global climate change, had Congress intended to legislate in an important public

policy area, "it would have done so in clear and unequivocal terms," as it had in other provisions of the legislation. *Arizona v. California*, 373 U.S. 546, 581 (1962). *See also Adams Fruit Co. v. Barrett*, 494 U.S. 638, 644 (1990) ("[h]ad Congress intended to limit further the availability of AWPA relief based on the adequacy of state workers' compensation remedies, it would have made that purpose clear. . . ."); *Connecticut Nat'l Bank*, 503 U.S. at 255 (Stevens, J., concurring). Similarly, as this Court has said, in cases involving assertions of agency power into new arenas, "courts should perform a close and searching analysis of congressional intent, remaining skeptical of the proposition that Congress did not speak to such a fundamental issue." *ACLU v. FCC*, 823 F.2d 1554, 1567 n.32 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988).

The reason courts demand clear legislative authorizations for the extension of agency authority into new arenas derives from the proper role of administrative agencies in our system of government. As Justice Rehnquist remarked in a similar context, Congress, not an agency, is "the governmental body best suited and most obligated to make the choice confronting us in this litigation." *Indus. Union Dept., AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 672 (1980) (Rehnquist, J., concurring in the judgment). Justice Brennan likewise concluded that "Congress has the resources and the power to inform itself, and is the appropriate forum where the conflicting pros and cons should have been presented and considered." *United States v. Robel*, 389 U.S. 258, 276 (1967) (Brennan, J., concurring in the result). According to Justice Brennan, "[f]ormulation of policy is a legislature's primary responsibility, entrusted to it by the electorate . . . 'without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government are not endowed with authority to decide them.'" *Id.* An agency that seeks to regulate in a new arena

of social or economic activity without a plain and explicit statutory authorization to do so usurps the constitutional role of Congress to promulgate policy in the first instance. John J. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 276-77 (2000) ("If Congress has addressed a subject, but has done so in a limited way, this fact itself may suggest that Congress has gone as far as the enacting coalition wished to, on the subject in question. If the Court permitted ... [the agency] to go further under ... [the Act's] general authority, such action might disturb the more precise policies adopted by Congress through bicameralism and presentment." footnotes omitted).

These principles have special application to the potentially significant restrictions on how this country uses energy that are involved with the global climate change issue. If, as the IPPC says, measures addressing global climate change must encompass the "full breadth of human social structures,"[13] it must be Congress, not EPA, that decides the matter.

In this case, the actions by Congress, after long debate, to address potential global climate change through scientific research and international negotiations, and to resist calls for mandatory regulation of GHG emissions, reflect a political and policy decision not to regulate, which carefully balances economic interests, scientific uncertainties, and energy/environmental concerns. For better or worse, depending on one's view of the issue, where Congress has so far chosen to stand marks the place where "opposing social and political forces have come to rest." *Chrysler v. Brown*, 441 U.S. 281, 313 (1979). EPA acted properly in this case in not asserting power it does not have to upset Congress' decision.

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[13] IPCC 2001, at 607.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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